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No. 91-1663

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. ELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission at petitioner's trial of statements made by a deceased accomplice of petitioner to law enforcement officers violated petitioner's rights under the Confrontation Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 951 F.2d 580. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 11a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on December 12, 1991. On March 3, 1992, the Chief Justice granted an extension of time until April 10, 1992, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of conspiracy to engage in extortion, in violation of 18 U.S.C. 1951; two counts of extortion, in violation of 18 U.S.C. 1951 and 1952; conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 90 months' imprisonment, to be followed by three years' supervised release. He was also fined $50,000. The court of appeals affirmed. Pet. App. 1a-10a.

1. Petitioner was a limited partner in Tri-State Greyhound Park, Inc., a West Virginia corporation that operates parimutuel betting on greyhound races. West Virginia law permitted Tri-State to keep a specified percentage—known as the "takeout"—of the revenue generated by public wagers. In 1987, a bill was introduced in the West Virginia legislature that would have increased the "takeout" percentage. Tri-State supported the bill and promised to pay petitioner $500,000 if it became law. Pet. App. 2a.

When the bill stalled in the West Virginia legislature, petitioner approached lobbyist Sam D'Annunzio and gave him approximately $20,000 in cash to obtain passage of the bill. D'Annunzio gave $10,000 of the money to State Senator Larry Tucker and offered cash and computer equipment to Senate President Dan Tonkovich. Gov't C.A. Br. 4-5. Eventually, the West Virginia legislature passed the bill and the Governor signed it into law. Pet. App. 2a.

Soon after the bill passed, federal authorities began an investigation of corruption surrounding the passage of the bill. As a result of that investigation, D'Annunzio entered into a plea agreement with the government. Pursuant to that agreement, D'Annunzio met several times with federal agents. During those meetings, at which D'Annunzio was represented by counsel, D'Annunzio explained the scheme to obtain passage of the bill and detailed his relationship with petitioner. D'Annunzio also recorded conversations with petitioner and other participants in the scheme. On December 4, 1988, in the midst of the investigation, D'Annunzio committed suicide. Pet. App. 3a.

2. At trial, IRS Special Agent Charles Little testified to the statements that D'Annunzio made in meetings with federal investigators. In particular, Agent Little testified to D'Annunzio's statements describing his dealings with Senators Tucker and Tonkovich. Pet. App. 12a. The district court admitted the statements under Federal Rule of Evidence 804(b)(5), the residual hearsay exception for unavailable declarants, after examining Agent Little's notes of the meetings with D'Annunzio. Pet. App. 12a-14a.

After his conviction, petitioner filed an untimely motion for a new trial, raising, among other claims, the contention that the Court's decision in *Idaho* v. *Wright*, 110 S. Ct. 3139 (1991), precluded admission of D'Annunzio's statements. Although the district court found that it lacked jurisdiction to consider the motion because it was untimely, the court nevertheless stated that D'Annunzio's willingness to engage in monitored conversations with the other participants in the scheme contributed to the reliability of his statements. Pet. App. 17a-18a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court applied a two-part test to determine whether

admission of D'Annunzio's statements violated the Confrontation Clause. That test required the government to prove (1) that the declarant was unavailable, and (2) that the statements "have the necessary 'indicia of reliability.' " Pet. App. 4a (quoting *Idaho* v. *Wright*, 110 S. Ct. at 3146). To satisfy the second part of the test, the court held, the government must show either that the statements fell within a firmly rooted hearsay exception or that "the statements bear sufficient guarantees of trustworthiness." Pet. App. 4a.

Applying that test, the court held that D'Annunzio's statements bore "strong 'indicia of reliability.' " Pet. App. 4a. Specifically, the court found the statements reliable for the following reasons:

> First, D'Annunzio issued the statements voluntarily in the presence of two government agents *and* both of his attorneys. Second, D'Annunzio made the statements in accordance with a plea agreement which required him to be truthful with federal investigators. Third, the government agents were taking notes in the presence of D'Annunzio as the statements were made. Fourth, D'Annunzio could be deemed to know, in view of the plea agreement, that what he was saying would be the subject of further investigation—and confirmation—by the government. Fifth, though the plea agreement did not require him to do so, D'Annunzio agreed to record subsequent conversations with the individuals he had implicated (Senators Tucker and [petitioner]), suggesting that he was willing to have the truthfulness of these statements tested.

Pet. App. 4a. The court also noted that petitioner had not questioned the accuracy of Agent Little's recollection of D'Annunzio's statements. Pet. App. 5a. The court

therefore held that the district court had properly admitted the statements. Pet. App. 6a.

ARGUMENT

Petitioner renews his contention (Pet. 8-26) that the district court's admission of a deceased declarant's hearsay statements at trial violated the Confrontation Clause. The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against them." In *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990), this Court reaffirmed that an out-of-court statement made by an unavailable declarant may be admitted into evidence without infringing the defendant's rights under the Confrontation Clause if the statement possesses adequate "indicia of reliability." *Id.* at 3147. See *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980). Reliability concerns are satisfied, without more, if the statement fits within a firmly rooted hearsay exception. *White* v. *Illinois*, 112 S. Ct. 736, 743 (1992); *Wright*, 110 S. Ct. at 3146-3147; *Roberts*, 448 U.S. at 66. If the statement does not fit within such an exception, it may nevertheless be admitted if the government shows that it carries "particularized guarantees of trustworthiness." *Wright*, 110 S. Ct. at 3147. That determination must be made by considering "the totality of the circumstances * * * that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 3148. Evidence that corroborates the truth of the out-of-court statement may not be used to support its reliability for Confrontation Clause purposes. *Id.* at 3150. Instead, the statement must be shown to "possess indicia of reliability by virtue of its inherent trustworthiness." *Ibid.*

As the court of appeals explained, the circumstances surrounding the statements at issue in this case afford sufficient guarantees of their reliability. First,

D'Annunzio knew that federal investigators would seek to confirm or refute his statements by further investigation, and that a false statement could subject him to prosecution and imprisonment. In addition, D'Annunzio gave the statements in the presence of his counsel, who could be expected to act as a check on any tendency D'Annunzio might have had to lie. Finally, D'Annunzio agreed to record conversations with the other participants in the scheme. Because D'Annunzio knew that such recordings would increase the risk of revealing any false statements that he made to the agents, his willingness to wear a recording device is a further indication that his statements are reliable.[1] Taken together, these circumstances adequately support the district court's decision to admit the statements.

Petitioner contends (Pet. 16-20) that the court of appeals' reliance on the fact that D'Annunzio gave the statements pursuant to a plea agreement conflicts with the decisions of other courts of appeals. But none of the decisions on which petitioner relies holds that the existence of a plea agreement can never be used to support the reliability of a hearsay statement. See, *e.g.*, *United States* v. *Gomez-Lemos*, 939 F.2d 326, 333 (6th Cir. 1991) ("That Barraza and Osorio had entered into plea agreements with the Government * * * *does not necessarily*

[1] Petitioner contends (Pet. 15) that, because D'Annunzio did not agree to wear a recording device until after he made the statements at issue, the court of appeals' reliance on this factor involves the improper use of corroborative evidence to "bootstrap" the reliability of the statements, contrary to this Court's decision in *Wright*. *Wright*, however, forbids the government from showing the reliability of hearsay statements based on corroborative evidence that the events described in the statements actually occurred. It does not prohibit the use of an item of corroborative evidence that "render[s] the declarant particularly worthy of belief." See 110 S. Ct. at 3148.

lessen the likelihood that they would want to curry favor with the Government, avenge themselves, or spread the blame by implicating defendant.") (emphasis added); *United States* v. *Feldman*, 761 F.2d 380, 387-388 (7th Cir. 1985) (plea agreement creates "substantial likelihood that the statement is self-serving" and "*possible* unreliability") (emphasis added). The decision in *United States* v. *Bailey*, 581 F.2d 341 (3d Cir. 1978), on which petitioner also relies (Pet. 17-18), was expressly based on non-constitutional grounds. See 581 F.2d at 351. In this case, D'Annunzio knew that the truthfulness of his statements would be tested in the course of the government's investigation, and that any false statements could subject him to prosecution and imprisonment. Accordingly, the court of appeals reasonably concluded that, in the circumstances of this case, the existence of the plea agreement was a factor that increased the reliability of the statements. The fact that other courts have found statements made pursuant to other plea agreements less reliable does not create a conflict requiring resolution by this Court.[2]

Petitioner also contends (Pet. 20-23) that the court of appeals' decision conflicts with the statement in *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986), that "the Confrontation Clause is uniquely threatened when an accomplice's

[2] Petitioner incorrectly suggests (Pet. 14) that the court's finding that D'Annunzio was aware that his statements would be subject to further investigation "would * * * apply to any statement made under a plea agreement." Obviously, the probability that a false statement will be uncovered by the government will vary with the circumstances of the case. In this case, the probability that a false statement would be detected was high. The government was pursuing an active investigation that included secret tape recordings of other participants in the scheme. At the very least, there was a reasonable probability that other participants would cooperate with the government.

confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." See also *Bruton* v. *United States*, 391 U.S. 123, 136 (1968) (accomplice's statement "inevitably suspect"). In *Lee*, however, the Court expressly recognized that the presumption of unreliability that attaches to such confessions may be rebutted by a showing that the statement bears sufficient indicia of reliability. 476 U.S. at 543. And in both *Lee* and *Bruton*, the statements at issue were given by the defendant's accomplice shortly after arrest, when the accomplice had the greatest incentive to cast blame on the defendant. In this case, in contrast, the statements were given in the presence of counsel and were attended by other guarantees of reliability.[3]

[3] Petitioner also contends (Pet. 24-26) that the federal agents' failure to preserve D'Annunzio's statements by means of tape recording or videotaping detracts from the reliability of the statements. That contention is inconsistent with petitioner's assertion (Pet. 14) that the fact that the agents made notes of the statements is "irrelevant" to the issue of reliability. In any event, the notes were relevant because they showed that Agent Little's testimony was consistent with his contemporaneous record of the statements. The fact that the statements were not recorded by other means did not preclude the use of the notes for that purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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